

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVID ALLAN GARRETSON,

Defendants.

Case No. 2:13-cr-00029-APG-GWF

**FINDINGS AND
RECOMMENDATIONS**

This matter is before the Court on Defendant David Allan Garretson's Motion to Suppress Based on Fourth Amendment Violation (#49), filed on April 8, 2013; the Government's Response in Opposition to Defendant's Motion to Suppress Based on Fourth Amendment Violation (#54), filed on April 20, 2013; Co-Defendant Derek Stephan Parker's Motion to Adopt Co-Defendant's Motion to Suppress Based on Fourth Amendment Violation (#59), filed on April 26, 2013; Defendant Garretson's Reply in Reference to Motion to Suppress Based on Fourth Amendment Violation (#62), filed on May 1, 2013; Defendant's Supplement to his Reply (#64), filed on May 2, 2013; and the Government's Supplement to Testimony of LVMPD Detective James Murray (#67), filed on May 9, 2013. The Court conducted an evidentiary hearing in this matter on May 7, 2013.

FACTUAL BACKGROUND

The indictment in this case charges Defendants David Garretson and Derek Parker with conspiracy to manufacture a controlled substance, marijuana, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(B)(vii); manufacture of a controlled substance and aiding and abetting in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii) and 18 U.S.C. § 2; maintaining a drug involved premises in violation of 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2; and possession of a controlled substance with intent to distribute and aiding and abetting in violation of 21 U.S.C. §§

1 841(a)(1) and (b)(C) and 18 U.S.C. § 2. Defendant Garretson is separately charged in Counts Five
2 and Six of the Indictment with being a prohibited person in possession of a firearm in violation of
3 18 U.S.C. §§ 922(g)(3) and 924(a)(2).

4 The foregoing charges are based on physical evidence that was found and seized during a
5 November 5, 2012 search of Defendant Garretson's house and garage pursuant to a search warrant
6 issued by a Clark County, Nevada justice of the peace on November 2, 2012. Defendant Derek
7 Parker is Mr. Garretson's adult son and also resided on the subject property at the time of the
8 search.

9 The principal issue raised by Defendant's motion to suppress is whether the warrantless
10 entry of two police officers onto Defendants' property on October 31, 2012 violated the Fourth
11 Amendment, thereby requiring the Court to disregard those portions of the search warrant affidavit
12 that were based on the police officers' observations during that entry. If the entry was unlawful,
13 then the Court must determine whether the remaining facts in the affidavit were sufficient to
14 support a finding of probable cause for the issuance of the search warrant. Finally, the Court must
15 decide whether the seizure of the firearms, which was not expressly authorized by the search
16 warrant, violated the Fourth Amendment.

17 **1. Contents of Search Warrant Affidavit.**

18 The November 2, 2012 Application and Affidavit for Search Warrant was prepared by Las
19 Vegas Metropolitan Police Department ("LVMPD") Detective James Murray. *Motion to Suppress*
20 *(#49), Exhibit A (hereinafter "Affidavit")*. At the time of the warrant application, Detective Murray
21 was assigned to the Narcotics Bureau. He was also a specially deputized task force officer with the
22 Drug Enforcement Administration ("DEA"), the Southern Nevada Joint Methamphetamine Task
23 Force ("SNJMTF") and the Southern Nevada Cannabis Operations and Regional Enforcement Task
24 Force ("SCORE") which are composed of Federal and Nevada law enforcement officers.

25 The affidavit stated that on June 4, 2012, the LVMPD Narcotics Bureau received
26 information from an anonymous source that two individuals living at 292 E. Ford Avenue, Las
27 Vegas, Nevada, identified as David Garretson and his son Derek Garretson, were growing and
28 dealing large amounts of marijuana at the residence. The anonymous source stated that the subjects

1 were switching the marijuana grow locations from the garage and guest house (which is attached to
2 the garage) and also inside the residence. The subjects both had medical marijuana cards, but were
3 growing beyond the legal amount for personal use and were dealing. The anonymous source also
4 stated that the subjects own two businesses, "Nevada Grow Op" and "Under Construction" which
5 are located at the residence. The anonymous source stated that the marijuana grow had all the
6 lights and equipment needed to run the operation. *Affidavit*, pg. 3.¹

7 Based on the anonymous tip, Detective Murray began an investigation. He obtained a
8 criminal history for David Garretson which showed "prior arrests (California 1977) for Possess
9 Marijuana for Sale; Plant/Cultivate/Etc Marijuana/Hash; Possess Control Substance for Sale; Use
10 Minor to Violate Control Substance Act and Possess/MFG/Sell Dangerous WPN/ETC, (California
11 1980) for Possess Narcotic Controlled Substance and (Nevada 2008) for Battery Domestic
12 Violence." *Affidavit*, pg. 4. The criminal history also showed that David Garretson had pled guilty
13 in California in 1978 to possession of controlled substance for sale and possession of narcotic
14 controlled substance.

15 A Department of Motor Vehicles ("DMV") records check showed that Mr. Garretson had a
16 current driver's license with an address of 292 E. Ford Avenue and that several vehicles were
17 registered to him at that address. Other DMV checks showed that Derek Stephan Parker, Donald
18 Garretson, Donzie Garretson, Cassandra Tuttle, Andreas Pineda and David Meyer listed 292 E.
19 Ford Avenue as their address. A criminal history check on Derek Parker revealed no prior criminal
20 history. Donald Garretson was a registered ex-felon and had prior convictions for possession of a
21 controlled substance with intent to sell and attempted theft. The other individuals listed at 292 E.
22 Ford Avenue did not have significant criminal histories. *Id.*, pg. 4.

23 Detective Murray conducted a records check with the Clark County Business License
24 Department which revealed business licenses for Nevada Grow Op and Under Construction Inc.

25
26 ¹According to an "Information Complaint Form," completed by a Narcotics Bureau employee on
27 June 4, 2012, the anonymous source also reported that the "suspects told PR everythign [sic] is legal that
28 the sheriff comes out and checks the plants." *Motion (#49), Exhibit C*. The Court has found that the
omission of this statement from the affidavit did not meet the threshold showing for an evidentiary hearing
under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674 (1978).

1 Nevada Gro Op was identified as a consultant service owned by David Garretson. Under
2 Construction Inc. was listed as a contractor service with no listed owner. The business telephone
3 number for Under Construction Inc. matched the phone number on subscriber information obtained
4 from Nevada Energy for David Garretson at 292 E. Ford Avenue. Detective Murray also conducted
5 a records check with the Nevada Secretary of State's office which identified Nevada Gro Op as a
6 domestic non-profit corporation whose officers were David Garretson, Don E. Garretson and James
7 Shaughnessy.

8 The affidavit stated that Detective Murray also conducted an internet search for Nevada Gro
9 Op which resulted in the discovery of a previous Twitter account for "Nevada Grow Op @NV
10 Grow." The Twitter account described the business as "Las Vegas Medical Marijuana Co-Op.
11 Website coming soon. Follow us to get Legal." *Id.*, pgs. 4-5. Detective Murray also conducted an
12 Internet Facebook search for David Allen Garretson and located an account under that name. The
13 account listed David Garretson as the president of Under Construction Inc. and contained several
14 uploaded photo albums. Inside one of the albums was a photograph dated October 17, 2012,
15 depicting an individual believed to be David Garretson holding a marijuana leaf and with numerous
16 marijuana plants in the background and equipment associated with marijuana grows in what
17 appeared to be a garage area. Another photograph dated October 12, 2012, depicted a four foot
18 marijuana plant, with numerous other marijuana plants in the background of what appeared to be a
19 garage area. On the comments to the side of this photograph an individual identified as Jim
20 Shaughnessy stated: "That don't look like a veggie?" An individual identified as David Allen
21 Garretson responded: "It's medical marijuana I grow for cancer patients! I do it for free all
22 volunteer work at a non profit medical research company." Garretson then stated: "I'm a grow
23 tech, farmer." Several other pictures were found on the Facebook site that depicted individuals
24 with large amounts (in excess of one pound) of processed marijuana. *Id.*, pg. 5.²

25
26 ²The Government introduced copies of the Twitter Account and Facebook pages referenced in the
27 affidavit as hearing exhibits. *See Government's Exhibits 2 and 3.* There is no evidence that these
28 documents were attached to the search warrant affidavit, however, and the Court does not consider them in
deciding this motion beyond the fact that they appear to verify the information that was provided in the
affidavit.

1 On June 7, 2012, Detective Murray conducted a check with the Nevada Department of
2 Health and was informed that the State of Nevada had issued a medical marijuana card to David
3 Garretson at 292 E. Ford Avenue, which had an expiration date of December 28, 2012. Detective
4 Murray was informed that David Garretson had not listed a primary care giver. Nor had he been
5 designated as a primary care giver. Detective Murray was also informed that Derek Parker had
6 previously been issued a medical marijuana card that expired on March 16, 2012. There was no
7 application pending for renewal of Mr. Parker's medical marijuana permit and he also had not
8 designated a primary care giver or been designated as a primary care giver. *Id.*, pg. 6. The affidavit
9 further stated:

10 As persons who held a valid registry card, Garretson and Parker
11 would be exempt from state prosecution for possession, delivery or
12 production of marijuana and/or drug paraphernalia with certain
13 limitations. Your affiant is familiar with NRS 453A which pertains
to the medical use of marijuana. The medical use of marijuana has
been justified in the state of Nevada to mitigate symptoms or effects
of a person's chronic or debilitating medical condition.

14 *Affidavit*, pg. 6.

15 On October 23, 2012, Detective Murray conducted a further records check with the Nevada
16 Department of Health and was informed that Donald Garretson, Donzie Garretson and Cassandra
17 Tuttle had not been issued medical marijuana cards and did not have applications for such cards
18 pending. David Meyer and Andreas Pineda had previously been issued medical marijuana cards
19 that expired in October 2011. They did not have renewal applications pending. Mr. Meyer and Mr.
20 Pineda had not designated primary care givers or been designated as primary care givers. Detective
21 Murray was advised by the Nevada Department of Health that it no longer releases information as
22 to whether a medical marijuana grow had been registered at a particular address. Detective Murray
23 was therefore unable to state whether or not there was any other authorized marijuana grow at 292
24 E. Ford Avenue. *Id.*, pg. 7.

25 The affidavit summarized the provision of Nevada's medical marijuana law as follows:

26 The exemption from state prosecution applies only to that person
27 who holds a registry identification card issued to them, and the
28 designated primary care giver, if any, of such person. Registrants
cannot at any one time, collectively possess, deliver or produce more
than one ounce of usable marijuana, three mature marijuana plants,

1 and four immature marijuana plants. If the person described above
2 delivers or produces marijuana in an amount which exceeds the
3 amount described, those persons are not exempt from state
4 prosecution for possession, delivery or production of marijuana, but
5 may establish an affirmative defense to charges of possession,
6 delivery or production of marijuana as defined in NRS 453A.310.

7 *Affidavit, pgs. 7-8.*

8 Detective Murray stated that a records check on October 31, 2012 with the LVMPD
9 firearms detail revealed that David Allen Garretson had a Glock .45 Caliber handgun registered to
10 him. The records check also revealed that Donald Edward Garretson had a Glock 9mm handgun
11 and a Walther 9mm handgun registered to him.

12 The affidavit stated that on October 23, 2012, Detective Murray conducted a “power
13 comparison” by submitting an administrative subpoena to Nevada Energy. A power comparison is
14 performed by comparing the electric power consumption records of a suspected premises to the
15 power consumption for other properties in the vicinity that have similar buildings with equal or
16 slightly greater square footage. The house at 292 E. Ford had 2142 “living square feet.” The
17 garage building on the property was 2250 square feet. There were separate electricity meters for
18 the house and the garage. Power consumption records were obtained for 335 E. Ford Avenue and
19 375 E. Ford Avenue. The houses at those addresses had total living square footage of 2173 and
20 2128, respectively. These properties also had garages of 805 and 807 square feet, respectively.
21 There was no indication in the affidavit that these garages had separate electricity meters. *Affidavit,*
22 *pg. 6*

23 The affidavit listed the monthly kilowatt hours (“KWH”) used by the house and garage at
24 292 E. Ford for the months of May through October, 2012 and the KWH used at 335 E. Ford
25 Avenue and 375 E. Ford Avenue during the same period. These records showed that the monthly
26 KWH used by the house at 292 E. Ford was generally in the same range as the KWH used by 335
27 E. Ford Avenue and 375 E. Ford Avenue during the same period. The KWH used for the garage at
28 292 E. Ford was greater than the KWH used by the house on that property or the KWH used by 335
E. Ford Avenue and 375 E. Ford Avenue. *Id.* During July 2012, the house at 292 E. Ford Avenue
used 2937 KWH. The property at 335 E. Ford used 2289 KWH and the property at 375 E. Ford

1 used 2974 KWH. During that same month the garage at 292 E. Ford used 3640 KWH. During the
2 months of May, June, August, September and October, the garage at 292 E. Ford Avenue used
3 twice as much or more electrical power than was used either by the house at 292 E. Ford or by the
4 properties at 335 E. Ford Avenue and 375 E. Ford Avenue. *Id.*, pg. 6.

5 The affidavit also included a general description of indoor marijuana grow operations,
6 including the substantial amount of electricity required to operate electrical lights, fans, air
7 conditioning units, water pumps, CO2 generators and other electrical appliances. *Affidavit*, pgs. 9-
8 12. Based on that information and the power comparison study, Detective Murray stated he and
9 other narcotics investigators believed the electrical usage at 292 E. Ford Avenue (including the
10 garage) was consistent with an indoor marijuana grow operation on the premises. *Affidavit*, pg. 7.

11 The affidavit stated that at 1:00 A.M. on October 31, 2012, Detectives Murray, Bachman,
12 Hart and Dockery conducted surveillance at 292 E. Ford Avenue. The detectives heard fans or an
13 air conditioning unit located on the northwest corner of the detached garage, continuously running
14 despite the fact that the temperature outside was 55-57 degrees. As the detectives neared the
15 northeast corner of the property, they smelled the odor of fresh propagating marijuana emitting
16 from the detached garage area. The surveillance was then terminated. *Affidavit*, pg. 8.

17 The affidavit further states:

18 On 10/31/2012 at approximately 1100 hours, Detectives conducted
19 investigative follow-up and surveillance at 292 E. Ford Avenue, Las
20 Vegas, Nevada. Detectives observed several vehicles parked on the
21 side of the residence along Placid Street next to the entrance gate.
22 Detectives then called out to the residence and received no response.
23 Detectives then entered thru the unlocked gate and proceeded to the
24 back door of the residence which was adjacent to the gate (On or
25 about 06-07-12 and 10-30-12 Detectives observed individuals arrive
26 at the residence, park on the side of the residence and then enter
27 through this gate). While walking to the back door Detectives
28 smelled what appeared to be the strong odor of fresh propagating
marijuana. Detectives then knocked several times calling out to the
occupants of the residence. While standing at the back door
Detectives observed (thru the glass door) two large glass jars
containing what appeared to be marijuana (in excess of 1 allowable
ounce per NRS 453A) on the kitchen counter. Detectives also
observed a cardboard box containing what appeared to be marijuana
plant trimmings on a table adjacent to the back door. Upon receiving
no response, Detectives walked around to the front door and knocked
several times in attempts to contact the occupants. While walking to
the front door, Detectives heard what appeared to be an A/C unit

continuously running on the northwest corner of the detached garage. While standing at the front door Detectives observed a business card from FBI Special Agent (SA) Schlumpf stuffed in the door near the knob. Upon receiving no answer at the residence Detectives departed the residence.

Detectives then contacted SA Schlumpf who stated they were at the residence the previous Friday (on an unrelated case) and that they also knocked on the both doors of the residence. Upon receiving no response they left a business card on the front and back doors. SA Schlumpf stated that while there they observed drug related items and marijuana on a table next to the back door. SA Schlumpf stated that David GARRETSON made contact with reference the unrelated case. SA Schlumpf also stated that Detectives should look at David GARRETSON'S Facebook page as it contained items that may be relevant to your affiant's investigation.

Affidavit, pgs. 8-9.

The search warrant authorized the officers to seize marijuana, paraphernalia associated with the indoor cultivation, ingestion and distribution of marijuana, documents establishing possessory interest in the premises and in the items seized, electronic records and currency. *Motion (#49), Exhibit D, Search Warrant.* During the search on November 5, 2012, the officers seized marijuana and approximately 135 marijuana plants. The officers also found and seized twenty (20) firearms, most of which were contained in two safes located in the master bedroom of the residence. In the master bedroom, the officers also found an "Extended Order for Protection Against Domestic Violence" that was issued by the District Court, Family Division, Clark County, Nevada against David Garretson on March 7, 2012 and which expired on March 7, 2013. *Government's Exhibit A.* The discovery of the firearms and the domestic protection order formed the basis for the charge in Count Six of the Indictment.

2. Facts Relating to the Officers' Warrantless Entry on October 31, 2012.

A. Physical Layout of the Property: The subject property is a rectangular shaped lot of approximately one acre-plus, located on the northwest corner of Ford Avenue and Placid Streets in Las Vegas, Nevada. Ford Avenue is an east-west street. Placid Street runs north-south. The long side of the property runs along Placid Street on the east. The south side of the property faces Ford Avenue. The property abuts other residential lots on its west and north sides. *Government's Exhibits 4, 4A, Google Satellite Map.* The house is located in the southeast quarter

1 of the property. The front of the house faces Ford Avenue and there is a semi-circular driveway in
2 front of the house. The garage is located in the northeast quarter of the property. A large
3 swimming pool and open patio area are located in the center of the property between the house and
4 the garage. *Id.*

5 The entire property is surrounded by a wall or fence that is approximately five feet high.
6 *Government's Exhibits 4, 4A, Google Satellite Map.* Most of the wall appears to be constructed of
7 concrete block covered with stucco. Near the southeast corner of the property, facing Ford Avenue
8 and Placid Street, there are sections of "pony walls," approximately two feet high, with wrought
9 iron/wire mesh screen fencing above the pony wall. *Government's Exhibits 7 and 8, photographs*
10 *of walls.* A person standing outside the property at these locations can see through the wire mesh
11 fence into the property, and toward the front and east sides of the house. There are also vehicle and
12 pedestrian gates in the walls that are constructed of wrought iron frames with wire mesh between
13 the frames. FBI Agent Henry Schlumpf, who visited the property on October 29, 2012, testified
14 that there are three vehicle gates on the south side of the property and two on the east side of the
15 property. The vehicle gates are approximately 5 feet high by 10 feet wide and roll open parallel to
16 the wall. Agent Schlumpf also testified that he observed two pedestrian access gates on the
17 property. One is located on the south side facing Ford Avenue and the other is on the east side of
18 the property facing Placid Street. The two pedestrian gates, as depicted in the photographs, also
19 appear to be about five feet high by three feet wide. These gates are on hinges and open into the
20 property. *Government's Exhibits 5, 6, 7, 8 and 9. See also Defendant's Exhibits A, B, and D.*

21 There is a vehicle access gate in front of the semi-circular driveway on the Ford Avenue
22 side of the property. Next to this gate is the pedestrian access gate. There is a stuccoed concrete
23 block pillar between the pedestrian and vehicle gates on which the address number "292" is posted.
24 *Government's Exhibits 5 and 6.* The front door of the house is visible from this gate and a person
25 entering through the pedestrian gate can walk across the circular driveway to the walkway that
26 leads to the front door. There is no door knob or handle on this pedestrian gate. *Id.* It has a latch
27 mechanism at the upper corner on the inside of the gate. *Defendant's Exhibits C.* A person
28 standing outside this gate can open it by reaching over the top of the gate and releasing the latch.

1 *Id.* There is no evidence that this gate was locked on October 31, 2012 or on any other date.

2 On the Placid Street or east side of the property, there is a graded gravel shoulder or strip
3 between the property wall and the street. This shoulder is sufficiently wide for automobiles to park
4 on the shoulder facing the exterior wall. *Government's Exhibits 8 and 9; Defendant's Exhibits*
5 *A and D.*³ There is a wrought iron/iron mesh vehicle gate and pedestrian gate in the wall
6 approximately at midpoint of the east side of the property. A person entering through the
7 pedestrian gate on the east side of the property faces the rear of the house and its covered patio area.
8 *Government's Exhibit 8, 12; Defendant's Exhibit B.* This pedestrian gate is equipped with a door
9 knob and deadbolt lock. *Defendant's Exhibits A and B.* There is a paved walkway between the
10 vehicle/pedestrian gate and the rear of the house. *Defendant's Exhibit B and E.* Agent Schlumpf
11 testified that there is also a paved walkway on the east side of the house connecting the front and
12 rear of the house.

13 The roof of the house extends out over a patio located on the rear or north side of the house.
14 The patio is also partially enclosed on the eastside by a wall. There is an archway between this
15 patio wall and the rear of the house. This archway is directly west from the pedestrian gate on
16 Placid Street. *Defendant's Exhibit B, Government's Exhibit 12.* There is a built-in shelf in the
17 patio wall and a television was located in this shelf. *Defendant's Exhibit B, Government's Exhibit*
18 *12.* There was a table and chairs inside the covered patio. A gas barbeque grill was located near
19 the covered patio area. *Government's Exhibit 12.* The rear of the house has double glass doors in
20 wood frames, i.e. "French doors." *Government's Exhibit 13.* A person inside the covered patio
21 area can look into the interior of the house through these glass doors or adjacent windows. *See also*
22 *Government's Exhibit 14, video recording.*

23 **B. FBI Agent Schlumpf's Testimony Regarding His Visit to the Property on**
24 **October 29, 2012:** FBI Agent Schlumpf testified that he went to 292 E. Ford Avenue on Monday
25

26 ³FBI Agent Schlumpf testified that vehicles also can park in front of the property on Ford Avenue.
27 There are no photographic exhibits depicting vehicles parked on the Ford Avenue side of the property. It
28 appears from the satellite map, *Exhibit 4*, however, that vehicles can park on the shoulder parallel to Ford Avenue.

1 October 29, 2012, during the daytime, to speak with David Garretson about a complaint by an
2 individual involved in a business dispute with Mr. Garretson. The individual reported that David
3 Garretson had sent threatening emails to him. Although Agent Schlumpf did not believe the
4 statements in the emails were prosecutable, he told the complaining individual that he would speak
5 to Mr. Garretson about them.

6 Agent Schlumpf testified that he parked his car on the Placid Street side of the property,
7 near the southeast corner of the property. He observed another vehicle parked in that area. Agent
8 Schlumpf walked around the outside of the property to the pedestrian gate on Ford Avenue. He
9 entered the property through that gate and walked to the front door of the house. Agent Schlumpf
10 testified that he knocked on the front door and may also have knocked on the front window, but
11 received no response. He wrote a note on one of his business cards, requesting that Mr. Garretson
12 call him. Agent Schlumpf believed he placed the card on the window near the front door. He then
13 exited the property by walking back through the front gate. He then returned to his car on the east
14 side of the property. Upon returning to his vehicle, Agent Schlumpf heard the sound of a television
15 coming from the rear of the house. He thought that the back door of house might be open and that
16 someone might be in that area. He proceeded to the pedestrian gate on the Placid Street side of the
17 property. He entered through that gate, which was unlocked, and walked to the rear of the house.
18 Upon entering the covered patio area, he observed the television on the shelf and that the rear doors
19 were closed. Agent Schlumpf testified that he also observed a jar on the patio table which appeared
20 to contain marijuana. Agent Schlumpf knocked on the glass doors, but received no response from
21 inside. He did not attempt to look inside the house. Agent Schlumpf testified that he took out
22 another business card, wrote his cell phone number on it and asked Mr. Garretson to call him. He
23 then placed the card in the little pile of marijuana he observed on the table, "figuring he'll probably
24 call me now." Mr. Garretson called him a couple of hours later.

25 Agent Schlumpf testified that the individual who complained to the FBI about Mr.
26 Garretson sent him a print-out of what purported to be pages from Mr. Garretson's internet
27 Facebook account. The print-out included a photograph of what appeared to be Mr. Garretson
28 standing in front of an indoor marijuana grow operation. Agent Schlumpf testified that he did not

1 personally inspect Mr. Garretson's Facebook account.

2 **C. Testimony of LVMPD Detective Randy Dockery:** LVMPD Detective Randy

3 Dockery was one of the officers involved in the investigation of the possible marijuana grow
4 operation at 292 E. Ford Avenue. Detective Dockery, along with Detective Bachman, participated
5 in surveillance of 292 E. Ford between midnight and 1:00 A.M. on October 30-31, 2012. During
6 this surveillance, he and Detective Bachman walked by, but did not enter, the subject property.
7 Detective Dockery testified that he and the other detectives heard air conditioning or cooler fans
8 running in the garage area. While standing in the driveway of the neighbor's property on the north
9 side of 292 E. Ford, the officers smelled the odor of freshly growing marijuana emanating from the
10 garage area. The odor of marijuana grew stronger as the officers approached closer to the garage
11 area. Detective Dockery testified that the outdoor temperature was cool and that the running of
12 fans in the garage area appeared to be consistent with a marijuana grow operation.

13 Detective Dockery testified that on October 31, 2012, at approximately 11:00 A.M., he and
14 Detective Beth Carroll attempted a "knock and talk" contact at 292 E. Ford Avenue. Detective
15 Carroll was assigned to the "crimes against youth and family bureau" and was involved in the
16 investigation based on the anonymous tipster's report in June 2012 of possible "child abuse"
17 involving Mr. Garretson's 10 year old son. Detective Dockery was not aware of any additional
18 information about this "child abuse" allegation.

19 Detective Dockery testified that upon arriving at the subject property on the morning of
20 October 31st, he and Detective Carroll parked on the east side of the property near the pedestrian
21 vehicle gate. Detective Dockery was wearing a hidden video camera and microphone which
22 recorded the officers' entry onto the property and which Detective Dockery intended to use to
23 record his anticipated contact with Mr. Garretson. The audio/video recording was admitted in
24 evidence at the hearing. *See Government's Exhibit 14.* Detective Dockery testified that he and
25 Detective Carroll approached the pedestrian gate on the Placid Street side of the property and called
26 out to the residence before opening the gate. The gate was unlocked and the officers opened it by
27 turning the door knob on the gate. The audio/video recording shows that the officers actually
28 opened the gate and stepped just inside the property before calling out to the residents. Detective

1 Dockery testified that he believed the gate on Placid Street was the “main entrance” to the home
2 because that was the side on which vehicles were parked. He stated that during previous
3 surveillance, officers had observed individuals park their vehicles on the east side of the property
4 and enter through that pedestrian gate. He had not observed anyone enter the property through the
5 pedestrian gate on the south side of the property. Detective Dockery also testified that he does not
6 believe a visitor to the property could gain access to the property through the pedestrian gate on the
7 south side of the property because a person has to reach over the top of that gate to open the latch.

8 Detective Dockery testified that upon entering the property, a large dog approached him and
9 Detective Carroll. After determining that the dog was not dangerous, the detectives proceeded to
10 the covered patio at the rear of the house. Upon entering the rear patio area, Detective Dockery
11 observed marijuana trimmings and paraphernalia “in plain view” on the patio table. Detective
12 Dockery knocked on the rear glass doors of the house and called out to anyone who might be
13 inside. There was no response. Detective Dockery was able to look through the glass doors all the
14 way to the front of the house. There were also windows near these doors that were not covered by
15 curtains. Detective Dockery looked through the glass doors or windows and observed “large jars”
16 inside the house that appeared to contain marijuana. Detective Dockery attempted to use the video
17 camera to record what he observed inside the house. Because of glare, the video camera did not
18 capture images inside the house.

19 Detective Dockery testified that after receiving no response at the rear door, he and
20 Detective Carroll walked to the west side of the house to see if they could find anyone. They found
21 no one, and proceeded around to the front door on the south side of the house. Detective Dockery
22 and Detective Carroll again attempted to make contact with an occupant by knocking on the front
23 door and calling out to anyone inside. They again received no response. Detective Dockery found
24 FBI Agent Schlumpf’s business card by the front door. Detective Dockery testified that after
25 receiving no response at the front door of the house, he and Detective Carroll returned to the rear of
26 the property and walked to the garage. They knocked on the door of the garage apartment, but also
27 received no response. Detective Dockery then walked around the garage looking for some one, but
28 again found no one on the property. He and Detective Carroll then left the property. Defendant

1 Dockery estimated that he and Detective Carroll were on the property approximately five minutes.
2 The audio/video recording indicates that Detectives Dockery and Carroll were on the property for
3 approximately 7-8 minutes. *Government's Exhibit 14*.

4 Detective Dockery testified that he subsequently spoke to Agent Schlumpf who told him
5 that he had gone to residence a few days earlier to speak with Mr. Garretson about an unrelated
6 matter. Agent Schlumpf stated that he had also observed marijuana in the rear patio area, and had
7 left his business card in the marijuana trimmings on the patio table. Agent Schlumpf also told
8 Detective Dockery that there were "some interesting photographs of Mr. Garretson on his Facebook
9 page." Detective Dockery testified that he looked at Mr. Garretson's Facebook page prior to
10 speaking with Agent Schlumpf, but "hadn't actually delved into it deeply." Detective Dockery
11 testified that he routinely looks at the Facebook pages of criminal suspects. He believes that it is
12 standard practice to do so in about half of the investigations. Following Detective Dockery's
13 conversation with Agent Schlumpf, he and Detective Murray reviewed David Garretson's
14 Facebook page and observed photographs of David Garretson inside what appeared to be a
15 marijuana grow operation, as well as postings relating to marijuana.

16 Detective Dockery participated in the execution of the search warrant on November 5,
17 2012. David Garretson, Derek Parker, and Mr. Garretson's ten year old son were present on the
18 property at the time of the warrant's execution. Detective Dockery testified that during the
19 execution of the search warrant a relative or friend of the Defendants came to the property and was
20 given possession of Defendants' dogs. Detective Dockery testified that this individual parked her
21 vehicle on the east side of the property and entered through the pedestrian gate located on that side
22 of the property.

23 **D. Testimony of Detective James Murray:** Detective James Murray testified that
24 he commenced the investigation of David Garretson and Derek Parker following the receipt of the
25 anonymous tip in June 2012. He conducted the records checks, including the power consumption
26 comparison, discussed in the search warrant affidavit. Detective Murray testified that physical
27 surveillance was conducted at 232 East Ford Avenue on June 7, 2012, October 30, 2012, and
28 October 31, 2012. Detective Murray testified that he and Detective Bachman conducted

1 surveillance at the property on the evening of June 7, 2012. He stated that while walking by the
2 property on Placid Street, they heard persons speaking in the backyard of the property. The
3 detectives observed vehicles parked on the Placid Street side of the property. They also observed
4 an individual exit the property through the pedestrian gate on the east side of the property and get
5 into a vehicle and leave the area. Detective Murray testified that while conducting surveillance on
6 October 30, 2012 at approximately 9:30 to 10:00 P.M., he and Detective Bachman observed an
7 individual exit the property through the pedestrian gate on Placid Street and get into a vehicle and
8 leave the area. The detectives observed another vehicle arrive and park on the east side of the
9 property. A person exited that vehicle and entered the property through the Placid Street pedestrian
10 gate. On cross-examination, Detective Murray testified that the surveillance of the property on
11 June 7, 2012 lasted approximately 30-45 minutes. The surveillance conducted at approximately
12 1:00 A.M. on October 31, 2012 also lasted approximately 30-45 minutes.

13 Detective Murray testified that the officers did not observe any "no-trespassing signs"
14 posted on the property at 292 East Ford. There were no door bells or intercoms located at the
15 entrance gates to the property. Detective Murray initially testified that persons could enter the
16 property through the vehicle and pedestrian gates located on the south side of the property.
17 However, on further questioning by Government's counsel, he testified that a person could not
18 enter through the pedestrian gate on the south side of the property because the gate latch was
19 located on the inside of the gate. He testified that the pedestrian gate on the Placid Street side of
20 the property was not locked. Detective Murray testified that if a door-to-door salesman
21 approached the property, he would presumably go the pedestrian gate on the Ford Avenue side of
22 the property, but when the salesman discovered that he could not gain access through that gate, he
23 would likely then go to the gate on the Placid Street side of the property and enter through that gate.
24 Detective Murray also testified that persons generally enter a residential property at the location
25 closest where they park their vehicles.

26 Detective Murray testified that the search warrant did not authorize the officers to search for
27 and seize firearms. During the search of the house, the officers found numerous firearms, the
28 extended order for protection against domestic violence order issued to David Garretson, and

1 numerous marijuana plants. Detective Murray testified that the firearms were found in places in the
 2 house that the officers searched or would have searched for marijuana and other items that the
 3 warrant authorized to be seized. He testified that one shotgun was found under the bed in
 4 Defendant Derek Parker's bedroom. One gun was found on a shelf in the master bedroom.
 5 Firearms were also found in two safes located in the master bedroom closet. Marijuana and drug
 6 paraphernalia were also found in one of the safes. Detective Murray testified that drug
 7 paraphernalia was found throughout the house.

8 **E. Testimony of Danielle Bennett:** Defendant Garretson's fiancé Danielle Bennett
 9 was called as a witness by the defense. Ms. Bennett is a United States Postal Service mail carrier.
 10 She delivers mail in Boulder City, Nevada. Ms. Bennett testified that as a mail carrier she delivers
 11 mail to residences that have gates at the front of the residences with latches on the inside of the gate
 12 similar the latch on the pedestrian gate at 292 East Ford Avenue. She testified that she regularly
 13 opens these gates to enter the properties and deliver mail. The Defendant introduced photographs
 14 of three such gates that Ms. Bennett encounters in the performance of her duties as a mail carrier.
 15 *Defendant's Exhibits F, G, and H.*

16 DISCUSSION

17 Defendants argue that Detectives Dockery's and Carroll's warrantless entry onto 292 E.
 18 Ford Avenue on October 31, 2012 violated the Fourth Amendment and that the evidence obtained
 19 as a result of that entry cannot provide a lawful basis for the issuance of the search warrant. *See*
 20 *United States v. Barajas-Avalos*, 377 F.3d 1040, 1054 (9th Cir. 2004) ("evidence which is obtained
 21 as a direct result of an illegal search and seizure may not be used to establish probable cause for a
 22 subsequent search.") When a search warrant affidavit contains illegally obtained evidence, a
 23 reviewing court is required to excise the tainted evidence from the affidavit and determine whether
 24 the remaining evidence would have provided probable cause for the issuance of the warrant. *Id.*, at
 25 1054, citing *United States v. Vasey*, 834 F.2d 782, 788 (9th Cir. 1987).

26 **1. Whether the Detectives' Entry Into the Rear Patio Area of Defendant's** 27 **House Violated the Fourth Amendment.**

28 "Where the government physically occupie[s] private property for the purpose of obtaining

1 information, that is a ‘search’ within the meaning of the Fourth Amendment.” *United States v.*
2 *Perea-Rey*, 680 F.3d 1179, 1184 (9th Cir. 2012), quoting *United States v. Jones*, --- U.S. ---, 132
3 S.Ct. 945, 949, 181 L.Ed.2d 911 (21012). Warrantless searches and seizures inside a home are
4 presumptively unreasonable. *Id.*, citing *Payton v. New York*, 445 U.S. 573, 586, 100 S.Ct. 1371, 63
5 L.Ed.2d 639 (1980). “Because the curtilage is part of the home, searches and seizures in the
6 curtilage without a warrant are also presumptively unreasonable.” *Id.*, citing *Oliver v. United*
7 *States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984). The curtilage is defined as an
8 area that, like the inside of the house, harbors the intimate activity associated with the sanctity of a
9 person’s home and the privacies of life. *United States v. Struckman*, 603 F.3d 731, 738 (9th Cir.
10 2010), citing *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). In
11 determining whether an area is part of the curtilage, the court examines four non-exclusive factors:
12 (1) the proximity of the area claimed to be curtilage to the home, (2) whether the area is included
13 within an enclosure surrounding the home, (3) the nature of the uses to which the area is put, and
14 (4) the steps taken by the resident to protect the area from observation by people passing by.
15 *United States v. Perea-Rey*, 680 F.3d at 1184, citing *United States v. Dunn*, 480 U.S. at 307.
16 *Perea-Ray* further states that “[t]hese factors do not yield a definite answer; rather they guide [us]
17 in determining whether the area is so intimately connected to the home that it should fall under the
18 umbrella of the Fourth Amendment’s protections.” *Id.* at 1184.

19 The property at 292 E. Ford Avenue is completely surrounded by a five foot high wall or
20 fence. It is debatable whether the entire property within the surrounding walls constitutes the
21 curtilage of the house. However, it is not necessary to resolve that debate in deciding this motion.
22 Detectives Dockery and Carroll entered the property through the pedestrian gate on the east side of
23 the property. They walked due west directly into the covered patio area at the immediate rear of the
24 house. Once inside the covered patio area, they observed marijuana on the patio table. Detective
25 Dockery looked inside the house through the glass doors or adjacent window and also observed
26 marijuana in jars located in the kitchen. This covered patio area is clearly within the curtilage of
27 the house under the *Dunn* factors. It is physically connected to the back wall of the house by the
28 extension of the roof over it and the wall/archway on its east side. The interior of the patio is

1 partially blocked or obscured from outside view on its east side by the patio wall and the shade
 2 provided by the roof and walls. This is best illustrated by the photographs in *Defendant's Exhibits*
 3 *B* and *E*, and *Government's Exhibit 12*. The physical connection between the patio and the house,
 4 together with presence of the dining table and chairs, the television, and the nearby barbeque, all
 5 give the patio the appearance of being an outdoor extension of the living or dining area of the
 6 house. It therefore satisfies the basic definition of curtilage as an area that "harbors the intimate
 7 activity associated with the sanctity of a man's home and the privacies of life." *United States v.*
 8 *Dunn*, 480 U.S. at 300, 107 S.Ct. at 1139.⁴

9 Police officers may, without a warrant, approach the entrance to a home for the purpose of
 10 contacting the occupant and attempting to engage him or her in a consensual conversation for
 11 purposes of investigation. This is referred to as a "knock and talk." *United States v. Perea-Rey*,
 12 680 F.3d at 1187, citing *United States v. Hammett*, 236 F.3d 1054, 1059 (9th Cir. 2001) and *Davis*
 13 *v. United States*, 327 F.2d 301, 305 (9th Cir. 1964). The court, in *Perea-Rey*, quoting *United States*
 14 *v. Titemore*, 335 F.Supp.2d 502, 505-06 (D.Vt. 2004), *aff'd*, 437 F.3d 251 (2d Cir. 2006), states
 15 that "[t]he law does not require an officer to determine which door most closely approximates the
 16 Platonic form of 'main entrance' and then, after successfully completing this metaphysical inquiry,
 17 approach only that door. An officer [initiating] a 'knock and talk' visit may approach any part of
 18 the building . . . where uninvited visitors could be expected." *Perea-Rey*, at 1188.

19 In *United States v. Garcia*, 997 F.2d 1273, 1279 (9th Cir. 1993), the court also stated:

20 This circuit and other circuits have also recognized that officers must
 21 sometimes move away from the front door when they are attempting
 22 to contact the occupants of a residence. Generally, the subsequent
 23 discovery of evidence in plain view does not violate the Fourth
 24 Amendment. *See United States v. Daoust*, 916 F.2d 757, 758 (1st
 25 Cir.1990) (if front door is inaccessible, "there is nothing unlawful or
 unreasonable about going to the back of the house to look for another
 door, all as part of a legitimate attempt to interview a person.");
United States v. Wheeler, 641 F.2d 1321, 1327 (9th Cir.1981) (officer
 was acting with a legitimate purpose when he looked over a fence

26 ⁴In *Florida v. Jardines*, --- U.S. ---, 133 S.Ct. 1409, 1415 (2013), the Supreme Court recently stated
 27 that the front porch of a house "is the classic exemplar of an area adjacent to the home to 'which the
 28 activity of home life extends.'" The rear patio of Defendant Garretson's house is at least as much within
 the curtilage as the front porch referenced in *Jardines*.

1 intending to call out to the defendant and then spotted contraband in
2 the yard); *United States v. Anderson*, 552 F.2d 1296, 1300 (8th
3 Cir.1977) (“We cannot say that the agents' action in proceeding to the
4 rear after receiving no answer at the front door was so incompatible
5 with the scope of their original purpose that any evidence
6 inadvertently seen by them must be excluded as the fruit of an illegal
7 search.”); *United States v. Freeman*, 426 F.2d 1351, 1352–53 (9th
8 Cir.1970) (no search when officers spotted marijuana in plain view at
9 the rear of an apartment after climbing a stairway which provided
10 access to both the rear and front of eight second floor apartments).

11 It is not permissible, however, for officers to simply ignore an accessible front entrance to a
12 house and proceed to the back door. As the Eighth Circuit states in *United States v. Wells*, 648
13 F.3d 671, 679 (8th Cir. 2011): “To the extent that the ‘knock-and-talk’ rule is grounded in the
14 homeowner’s implied consent to be contacted at home, we have never found such consent where
15 the officers made no attempt to reach the homeowner at the front door.”

16 Whether police officers act reasonably in approaching a particular entrance depends on the
17 facts of each case. In *Garcia*, the officers acted reasonably in approaching what they believed was
18 the front door of defendant’s apartment, even though it was, in fact, the back door. In *Titemore*, the
19 court found that the officers acted reasonably because there were two entrances to defendant’s
20 house, either of which uninvited visitors could be expected to approach. In *Wells*, however, the
21 court held that the officers violated the Fourth Amendment because they made no attempt to
22 contact the homeowner at his front door and instead proceeded directly into the backyard. In
23 *Perea-Rey*, a border patrol officer followed a suspect to defendant’s house. He observed the
24 suspect knock on the front door of the house and saw the defendant open the front door and direct
25 the suspect around to the enclosed carport on side of the house. Instead of also approaching the
26 front door, the officer entered the property and went directly into the carport where he confronted the
27 defendant and the suspect. In holding that the officer violated the Fourth Amendment, the court
28 stated that the carport was within the curtilage and was not an area that *uninvited* visitors would
reasonably be expected to enter.

29 The evidence in this case supports the conclusion that the entrance on the south side of 292
30 E. Ford Avenue is the “front” entrance of the house to which uninvited visitors such as
31 salespersons, delivery men, religious missionaries, political candidates, neighbors, or police

1 officers can reasonably be expected to approach in order to make contact with the residents. There
2 is a semi-circular driveway in front of house on this side of the property. There are two vehicle
3 gates in the wall/fence in front of this driveway, as well as the pedestrian gate, all of which make
4 this side of the property appear relatively open. The house numbers are posted on the pillar next to
5 the pedestrian gate. Ms. Bennett testified that the mail box is also located near this gate. During
6 the hearing, Detective Murray referred to the south side of the house as its "front." Detective
7 Murray's search warrant affidavit also stated that the Detectives "entered through the unlocked gate
8 and proceeded to the back door of the residence which was adjacent to the gate." *Affidavit, pg. 8.*
9 During the hearing, Detective Dockery testified that there was no true front entrance to the
10 residence. However, he also referred to the covered patio as being at the rear or back of the house.

11 FBI Agent Schlumpf's testimony is perhaps the most persuasive evidence as to what an
12 objective uninvited visitor would consider the front entrance to the house. Agent Schlumpf
13 testified that he drove past the property on Ford Avenue and parked his automobile on the eastside
14 of the property along Placid Street. After exiting his vehicle, he walked around to the south side of
15 the property, entered through the pedestrian gate and then approached and knocked on the front
16 door of the house. After receiving no response and leaving his business card, Agent Schlumpf
17 exited the property through the same pedestrian gate and walked back to his vehicle on the east side
18 of the property. Agent Schlumpf then heard the sound of a television at the rear of the house. He
19 therefore entered the property through the pedestrian gate on the east side of the property and
20 proceeded to the rear patio area where he thought the resident might be.

21 The Government's assertion that the pedestrian gate on the Placid Street is the only
22 accessible pedestrian entry to property is unpersuasive. This assertion is based, in part, on the fact
23 that this pedestrian gate is equipped with a door knob, whereas the pedestrian gate on the south side
24 of the property has a latch on the inside top of the gate. The latch mechanism would not impede an
25 adult person of average dexterity from opening the gate. It did not impede Agent Schlumpf on
26 October 29th. Such latch mechanisms are fairly common and do not indicate to a reasonable visitor
27 that he or she should not open the gate and enter. Ms. Bennett's testimony that she encounters and
28 opens such gates in her duties as a mail carrier in Boulder City merely supports what common

1 experience indicates. Detectives Dockery and Carroll also made no attempt to enter through the
2 pedestrian gate on Ford Street and there was no testimony that they were even aware of the latch
3 mechanism on that gate before they entered through the Placid Street gate.

4 The Government also argues that it was reasonable for the officers to enter through the
5 Placid Street pedestrian gate because the detectives observed that vehicles were parked only on the
6 east side of the property and they only saw individuals enter or exit the property through the Placid
7 Street pedestrian gate. The detectives conducted surveillance on two or possibly three⁵ occasions
8 prior to Detectives Dockery's and Carroll's entry on October 31, 2012. The surveillance occurred
9 relatively late at night or in the very early morning hours when it is unlikely that uninvited visitors
10 would be present. The detectives observed unidentified individuals enter or exit through the Placid
11 Street gate a total of three times. The detectives did not know whether these persons were residents
12 or invited guests. The detectives' observations of a few unidentified individuals entering or exiting
13 the property at nighttime did not provide a reasonable basis to believe that the Placid Street
14 pedestrian gate was a reasonable entrance point for uninvited visitors. Even if it was reasonable for
15 the detectives to enter through that gate, there was no reason why they could not or should not have
16 first proceeded to the front door of the house, rather than entering directly into the rear patio area.
17 The Court concludes that Detectives Dockery's and Carroll's October 31, 2012 entry into the rear
18 patio area was not an objectively reasonable attempt to contact Defendant Garretson. The entry
19 therefore constituted a warrantless search in violation of the Fourth Amendment and the detectives'
20 observations resulting from that search cannot legally support the issuance of the search warrant.

21 Evidence that is derived directly or indirectly from an illegal search cannot "constitute proof
22 against the victim of the search." *Wong Sun v. United States*, 371 U.S. 471, 484 83 S.Ct. 407, 9
23 L.Ed.2d 441 (1963); *United States v. Perea-Rey*, 680 F.3d at 1184. In *United States v. Duenas*, 691
24 F.3d 1070, 1082 (9th Cir. 2012), however, the court also states:

25
26 ⁵Detective Murray indicated on direct examination that he and Detective Bachman conducted
27 surveillance of the property at approximately 9:30 to 10:00 P.M. on October 30, 2012. Later on cross-
28 examination, however, he indicated that surveillance occurred on the evening of June 7, 2012 and between
midnight and 1:00 A.M. on October 31, 2012.

1 A Fourth Amendment violation, however, does not automatically
 2 trigger the exclusionary rule. Rather, the rule applies only where the
 3 benefit of deterrence outweighs the rule's "substantial social costs."
 4 *Davis v. United States*, --- U.S. ---, 131 S.Ct. 2419, 2427, 180
 5 L.Ed.2d 285 (2011) (quoting *United States v. Leon*, 468 U.S. 897,
 6 907, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984)). Application of the
 7 exclusionary rule is a fact-intensive inquiry. See *United States v.*
\$186,416.00 in Currency, 590 F.3d 942, 950 (9th Cir. 2010). "To
 apply the exclusionary rule to [a] unique set of facts . . . we must
 consider the rule's dual purposes: to deter similar police misconduct
 in the future and preserve the integrity of the courts." *Id.* (citing
Dunaway v. New York, 442 U.S. 200, 217-18, 99 S.Ct. 2248, 60
 L.Ed.2d 824 (1979)).

8 Under this standard, the detectives' observations of marijuana in the rear patio and inside
 9 the house must be suppressed and cannot be used to support the issuance of the search warrant.

10 Defendants also argue that the information in the affidavit regarding Defendant Garretson's
 11 Facebook account should be excised because the detectives found Agent Schlumpf's business card
 12 at the front door after their unlawful entry. Detective Dockery subsequently contacted Agent
 13 Schlumpf who directed him to Defendant Garretson's Facebook account. The exclusionary rule
 14 does not require the suppression of this evidence. The detectives could lawfully approach the front
 15 door in an effort to contact the Defendants. The fact that the detectives went to the front door only
 16 after they had entered the rear patio, does not make their approach to the front door unlawful.
 17 There is not a sufficient nexus between the Fourth Amendment violation and the officers'
 18 subsequent review of Defendant's Facebook account to require the suppression of this evidence.
 19 This conclusion is further supported by the fact Defendant Garretson's Facebook account contained
 20 information relating to his possession and production of marijuana that he chose to make public.
 21 Based on Detective Dockery's testimony, it is also reasonable to believe that the police would have
 22 discovered this information prior to applying for the warrant even if they had not been directed to it
 23 by Agent Schlumpf. However, even if they would not have taken a closer look at the Facebook
 24 account, but for Agent Schlumpf's suggestion, the exclusionary rule does not require the Court to
 25 excise this information from the warrant.

26 . . .

27 . . .

28 . . .

1 **2. Whether the Affidavit, Absent the Unlawfully Obtained Evidence,**
2 **Contains Sufficient Evidence to Support A Finding of Probable Cause**
3 **for the Issuance of the Warrant.**

4 The Court must now determine whether the affidavit, absent the illegally obtained evidence,
5 provided sufficient evidence to support a finding of probable cause for the issuance of the warrant.
6 Defendants argue that the Court is required to determine whether there was probable cause to
7 believe that evidence of a violation of Nevada criminal law would be found on the premises.
8 Nevada law permits the possession and cultivation of a limited quantity of marijuana by individuals
9 who have obtained a “medical marijuana card” or who are registered as primary care givers for
10 medical marijuana cardholders. Although the indictment in this Court charges Defendants with
11 violations of the Federal Controlled Substances Act, Detective Murray applied to a Clark County,
12 Nevada justice of the peace for the issuance of the search warrant based on the alleged violation of
13 Nevada law.

14 The Ninth Circuit has addressed this issue in *United States v. \$186,416.00 in Currency*, 590
15 F.3d 942 (9th Cir. 2010). In that case, the Los Angeles Police Department (“LAPD”) obtained a
16 search warrant from a state court judge to search the offices of a marijuana dispensary, UMCC.
17 Pursuant to the warrant, the LAPD seized \$200,000 in marijuana sales proceeds. No criminal
18 charges were filed against UMCC or any of its employees. After UMCC filed a motion in state
19 court for the return of the currency, the LAPD presented an order to the state court authorizing the
20 release of the proceeds from state jurisdiction so that the federal government could initiate civil
21 forfeiture proceedings pursuant to 21 U.S.C. §881(a)(6). UMCC filed a motion to suppress in the
22 forfeiture proceedings, arguing that the currency was seized in violation of the Fourth Amendment
23 and that the Government did not have grounds independent of the unlawful seizure to support the
24 forfeiture. Although the district court found that the LAPD had probable cause to believe that
25 UMCC was operating in violation of *federal* narcotics law, it held that the LAPD erred in failing to
26 comply with the procedural requirements of Rule 41 of the Federal Rules of Criminal Procedure,
27 such as having a federal law enforcement officer obtain the warrant from a federal magistrate judge,
28 unless none was reasonably available. The Ninth Circuit affirmed the granting of the motion to
 suppress, but rejected the district court’s analysis as follows:

1 We cannot approve this analysis. Rule 41 is inapplicable to
2 “searches conducted by state officers with state warrants issued by
3 the state judges, with minimal or no federal involvement, even if
4 federal prosecution results. *United States v. Piver*, 899 F.2d 881, 882
5 (9th Cir. 1990). The present case fits this description. Only a
6 “federal law enforcement officer or an attorney for the government”
7 can request a search warrant under Rule 41, and no such individual
8 was involved in requesting the warrant at issue here. Fed.R.Crim.P.
9 41(b).

10 While there may have been probable cause to search UMCC for a
11 violation of federal law, that was not what the LAPD was doing.
12 Nothing in the documents prepared at the time the warrant was
13 obtained from the state court or in the procedure followed to obtain
14 that warrant supports the proposition that the LAPD thought it was
15 pursuing a violation of federal law. Instead, it sought a warrant from
16 a state court judge, though as the District Court found, it lacked
17 probable cause for a state law violation and failed to inform the state
18 court judge of relevant facts that supported the conclusion that
19 UMCC was not in violation of state law. The LAPD, a city agency,
20 never initiated the process of seeking a federal search warrant from a
21 federal magistrate or indicated that it was pursuing a violation of
22 federal law.

23 *United States v. \$186,416.00 in Currency*, 590 F.3d at 948.

24 The search warrant affidavit in this case stated that property to be seized “constitutes
25 evidence which tends to demonstrate that the criminal offense of Possession of a Controlled
26 Substance with Intent to Sale have been and continue to be committed in violation of Chapter 453
27 of the NRS [Nevada Revised Statutes].” *Affidavit*, pg. 2. (Bracketed material added.) The affidavit
28 also discussed the exemption from prosecution for medical marijuana cardholders under Chapter
453A of Nevada Revised Statutes, but asserted that there was probable cause to believe that
Defendants Garretson and Parker were engaged in the possession or production of marijuana in
excess of the quantities authorized under the Nevada statutes. Regardless of whether Detective
Murray contemplated possible federal prosecution, nothing in the affidavit or in the procedure
followed to obtain the search warrant from the state court judge supports a finding that Detective
Murray or the LVMPD were pursuing violations of federal law. The Court must therefore
determine whether the affidavit provided probable cause to believe that evidence of a violation of
Nevada’s controlled substances laws would be found on the premises.

Nevada Revised Statute (NRS) §453A.200.1 provides that a person who holds a valid
medical marijuana card is exempt from state prosecution relating to the possession, production or

1 delivery of marijuana provided that the medical marijuana cardholder or designated primary
2 caregiver does not, at any one time, possess, deliver or produce more than (1) one ounce of usable
3 marijuana, (2) three mature marijuana plants, and (3) four immature marijuana plants. *See* NRS
4 §453A.200.3 and 4. NRS §453A.310 also provides that compliance with the statute is an
5 affirmative defense to a criminal charge of possession, delivery or production of marijuana. A
6 person charged with a state marijuana offense may also establish an affirmative defense to the
7 charge by showing, by a preponderance of the evidence, that a greater amount of marijuana than
8 that authorized under NRS §453.200.1 is medically necessary as determined by the person's
9 attending physician to mitigate the symptoms or effects of the person's chronic or debilitating
10 medical condition. *See* NRS §453A.310.1(a)(3). Thus, in this case the officers were required to
11 show in the affidavit that there was probable cause to believe that evidence of the possession,
12 production or delivery of marijuana in excess of the amounts authorized under Defendant
13 Garretson's medical marijuana card would be found on the premises.

14 The existence of probable cause is determined by the totality of the circumstances.
15 Probable cause is a fluid concept which turns on the assessment of probabilities in particular factual
16 contexts, not readily or even usefully reduced to a neat set of legal rules. *Illinois v. Gates*, 462 U.S.
17 213, 231, 103 S.Ct. 2317, 2328-29, 76 L.Ed.2d 527 (1983); *United States v. Adjani*, 452 F.3d 1140,
18 1145 (9th Cir. 2006). In *United States v. Gourde*, 440 F.3d 1065, 1069 (9th Cir. 2006), the court
19 stated that "probable cause means 'fair probability,' not certainty or even a preponderance of the
20 evidence. In short, a magistrate judge is only required to answer the 'commonsense, practical
21 question whether there is 'probable cause' to believe that contraband or evidence is located in a
22 particular place' before issuing a search warrant." *Id.*, at 1160. Law enforcement officers may
23 draw upon their experience and expertise in determining the existence of probable cause. *United*
24 *States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992). Likewise, judges may reasonably rely on the
25 officers' experience and expertise as to particular factual matters in determining whether probable
26 cause exists to support the issuance of the warrant. Although the issuing judge's probable cause
27 determination is ordinarily entitled to great deference, in this case the Court is required to reassess
28 probable cause without the illegally obtained evidence that was included in the original affidavit.

1 Accordingly, the general rule of deference does not apply.

2 As set forth in the search warrant affidavit, the investigation in this case arose from the
3 anonymous telephone tip that the LVMPD received on June 4, 2012. The anonymous tipster
4 reported that Defendant Garretson and his son were “growing and dealing large amounts of
5 marijuana at the residence.” *Affidavit*, pg. 3. The tipster also reported that Garretson and his son
6 had medical marijuana cards, “but are growing beyond the legal amount for personal use and are
7 dealing.” *Id.* The tipster further stated that the “marijuana grow has all the lights and equipment
8 needed to run the operation.” *Id.*

9 Based on the anonymous tip, Detective Murray began an investigation. He obtained
10 Defendant Garretson’s criminal history which revealed quite old arrests for possession of marijuana
11 with intent to sell in the late 1970’s and 1980. Detective Murray also obtained business records
12 regarding Mr. Garretson’s businesses: Under Construction, Inc. and Nevada Grow Op. Detective
13 Murray reviewed the twitter account for Nevada Gro Op which described the business as “Las
14 Vegas Medical Marijuana Co-Op. Website coming soon. Follow us to get Legal.” *Affidavit*, pg. 5.
15 Detective Murray also determined that Defendant Garretson had a valid medical marijuana card.
16 However, the card issued to Co-Defendant Derek Parker had expired. Detective Murray also
17 determined that the other persons, that DMV records indicated were possibly residing at 292 E.
18 Ford Avenue, did not have valid medical marijuana cards.

19 Detective Murray subsequently reviewed Defendant Garretson’s Facebook account website
20 and observed a picture of a person who appeared to be Defendant Garretson “holding a marijuana
21 leaf and in the background numerous marijuana plants and equipment associated with marijuana
22 grows” in what appeared to be a garage area. *Id.* The Facebook website also contained a statement
23 by Defendant Garretson that a picture on the website depicted “medical marijuana I grow for cancer
24 patients! I do it for free all volunteer work at a non profit medical research company.” Mr.
25 Garretson also stated “I’m a grow tech, farmer.” Other pictures in the Facebook account showed
26 individuals with large amounts of processed marijuana. *Id.*

27 Detective Murray also obtained a power usage comparison, which combined with his and
28 other detectives’ knowledge about the electricity needed to operate an indoor marijuana grow,

1 indicated the electrical usage at 292 E. Ford Avenue was consistent with an indoor marijuana grow.
2 Finally, the detectives conducted surveillance of the property between midnight and 1:00 A.M. on
3 October 31, 2012 during which they smelled a strong odor of growing marijuana in the vicinity of
4 the garage and heard the garage's air conditioning unit(s) operating despite the fact that it was only
5 57 degrees outside.

6 Detective Murray's affidavit did not conclusively establish that a marijuana grow operation
7 in excess of the quantities authorized under NRS §453A.200.1 was being conducted on
8 Defendant's premises. A finding of probable cause, however, does not require conclusive
9 evidence. The information provided by the anonymous tipster, as supported by the power
10 comparison survey, the photographs and statements in Defendant Garretson's Facebook account
11 website, and the officers observations during the surveillance on October 31, 2012, reasonably
12 indicated that a substantial marijuana grow operation was being conducted on the premises. This
13 was sufficient to support a finding of probable cause for the issuance of the search warrant, even
14 with the excision of the evidence that was obtained during Detective Dockery's and Carroll's
15 warrantless entry.

16 **3. Whether the Seizure of the Firearms Was Lawful.**

17 During the search, the officers discovered and seized 135 marijuana plants, as well as
18 processed marijuana. The search warrant did not authorize the seizure of firearms or ammunition.
19 During the execution of the warrant, however, the officers found numerous firearms in Defendant
20 Garretson's house. One handgun was found on a shelf in the master bedroom which allegedly is
21 Defendant Garretson's bedroom. Numerous long guns were discovered in two safes in the master
22 bedroom closet. In that closet, the officers also discovered a copy of an Extended Order for
23 Protection Against Domestic Violence which had been issued against Defendant Garretson on
24 March 7, 2012 and which was to expire on March 7, 2013.

25 The Government argues that the officers were entitled to seize the firearms as evidence of
26 criminal activity under the "plain view" doctrine. "To satisfy the plain view doctrine: (1) the
27 officer must be lawfully in the place where the seized item was in plain view; (2) the item's
28 incriminating nature was immediately apparent; and (3) the officer had a lawful right of access to

1 the object itself.” *United States v. Wong*, 334 F.3d 831, 838 (9th Cir. 2003), citing *Horton v.*
 2 *California*, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990). Here, the police
 3 officers were lawfully entitled to enter Defendant Garretson’s house to search for marijuana and
 4 related items pursuant to the search warrant. The detectives testified that they searched for
 5 marijuana in Defendant Garretson’s bedroom, in the bedroom closet and in the safes. In fact, some
 6 marijuana was found in one of the safes where firearms were also found. The first and third prongs
 7 of the plain view doctrine are therefore satisfied.

8 Nevada Revised Statute (NRS) §202.360.1(c) provides that a person shall not own or have
 9 in his or her possession or under his or her custody or control any firearm if the person is an
 10 unlawful user of, or addicted to, any controlled substance. 18 U.S.C. § 922(g)(3) also prohibits a
 11 person from possessing a firearm if he or she is an unlawful user of or addicted to a controlled
 12 substance as defined in 21 U.S.C. § 802. Detective Murray testified that the firearms were seized
 13 after Defendant Garretson made a voluntary statement that he smoked four to five marijuana joints
 14 on a daily basis. This statement, combined with discovery of the firearms in plain view, provided
 15 probable cause for their seizure. Although the officers could have applied for a warrant to seize the
 16 firearms, they were not required to do so.

17 CONCLUSION

18 The Court concludes that Detectives Dockery’s and Carroll’s warrantless entry into the rear
 19 patio of Defendant’s house violated the Fourth Amendment. The marijuana evidence that they
 20 observed during that unlawful entry must therefore be excised from the search warrant affidavit.
 21 The remaining facts set forth in the search warrant affidavit, however, still provided probable cause
 22 to support the issuance of the search warrant. The officers also had probable cause to seize the
 23 firearms which were found in plain view during the execution of the search warrant. Accordingly,

24 RECOMMENDATION


25 **IT IS HEREBY RECOMMENDED** that David Allan Garretson’s Motion to Suppress
 26 Based on Fourth Amendment Violation (#49), and Defendant Parker’s Motion to Adopt Co-
 27 Defendant’s Motion to Suppress Based on Fourth Amendment Violation (#59) be **denied**.

28 . . .

NOTICE

Pursuant to Local Rule IB 3-2, any objection to this Finding and Recommendation must be in writing and filed with the Clerk of the Court within fourteen (14) days. The Supreme Court has held that the courts of appeal may determine that an appeal has been waived due to the failure to file objections within the specified time. *Thomas v. Arn*, 474 U.S. 140, 142 (1985). This circuit has also held that (1) failure to file objections within the specified time and (2) failure to properly address and brief the objectionable issues waives the right to appeal the District Court's order and/or appeal factual issues from the order of the District Court. *Martinez v. Ylst*, 951 F.2d 1153, 1157 (9th Cir. 1991); *Britt v. Simi Valley United Sch. Dist.*, 708 F.2d 452, 454 (9th Cir. 1983).

DATED this 6th day of June, 2013.



GEORGE FOLEY, JR.
United States Magistrate Judge